

The 'Bonn Powers' of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment

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Abstract

The article traces the legal basis of the so-called 'Bonn Powers' that are claimed by the Office of the High Representative (OHR) in Bosnia and Herzegovina (BiH) as the basis for its extensive legislative, judicative, and executive decisions. The OHR's presence in BiH offers a very controversial example of how international institutions may exercise international public authority. The OHR has attracted far-reaching criticism and it has in fact been argued that its practice of adopting binding decisions runs contra to the main purpose of the civilian international presence in BiH. The contribution offers an analysis that substantiates such criticism on legal grounds. It discusses exemplary OHR decisions that reach far into the legislative, the executive, and the judicial domain of BiH and analyses possible legal sources for the broad powers claimed by the OHR. It explores the limits of the OHR's original mandate in light of the *Vienna Convention on the Law of Treaties* and it looks at the implied powers doctrine as a basis for the OHR's claims. It also considers a conferral of the 'Bonn Powers' on behalf of the United Nations Security Council. The article concludes that the 'Bonn Powers' do not qualify as a legal power and that their existence is merely a powerful, but delusive legal fiction.

A. Introduction

Sixteen years after the signing of the 1995 *Dayton Peace Agreement* (DPA), Bosnia and Herzegovina (BiH) is still under the extensive control of the Office of the High Representative (OHR),¹ an international institution set up to support the country's peace implementation process. As a relic of the immediate post-war era, the OHR's involvement in Bosnian domestic politics is still far-reaching and includes, *inter alia*, the imposition of substantial legislation, the amendment of Bosnian legislation, the dismissal of elected government officials, and the annulment of decisions of the Bosnian Constitutional Court.

The OHR's presence in BiH is thus a good example of how international institutions may exercise international public authority. The exercise of international public authority by the OHR has over the past years increasingly faced criticism from academia, NGOs, international institutions, and from the Government of the Republika Srpska. It has been argued that the binding

¹ The terms 'Office of the High Representative' (OHR) and 'High Representative' (HR) are used synonymously. Due to the institutional character of the problems addressed, the primarily used term will be 'Office of the High Representative'.

decisions adopted by the OHR run contrary to the main purpose of the civilian international presence in BiH which is the civilian implementation of the DPA. Moreover, it has even been argued that the form of international transitional administration as exercised by the OHR today obstructs the transformation of BiH into a sovereign State based on the rule of law, democracy, and well-governed democratic institutions. It is said that the unrestrained exercise of issuing binding decrees might have been justified as an emergency power during the immediate post-Dayton period. Yet this state of emergency has long vanished. Critics have thus labelled the OHR an “international protectorate”,² or the “European Raj”.³

While academic debate has largely focussed on the appropriateness and the legitimacy of OHR’s exercise of public authority, the legality of OHR’s conduct under international law has received little attention. This article examines the legal basis of OHR’s far-reaching practice to adopt legally binding decisions. The so-called ‘Bonn Powers’, which are regularly invoked to justify OHR decisions, are of central importance in this regard.

B. The *Dayton Peace Agreement*

The DPA, initialled in November 1995, forms the legal basis of the OHR. Consisting of the *General Framework Agreement* (GFA),⁴ its eleven Annexes, “each of them constituting an international treaty”,⁵ and of the *Agreement on Initialling*, the DPA is an “intricate legal web” which mirrors the “multi-faceted nature of the conflict” and its entanglement of ethnic, religious, political, and military elements.⁶

The Parties to the GFA are the Republic of BiH, the Republic of Croatia, and the Federal Republic of Yugoslavia. In contrast, most of the Annexes are only concluded by the Republic of BiH and its constituent entities, the

² M. T. Parish, ‘The Demise of the Dayton Protectorate’, 1 *Journal of Intervention and State Building* (2007) (Special Supplement), 11, 11.

³ G. Knaus & F. Martin, ‘Lessons from Bosnia and Herzegovina – Travails of the European Raj’, 14 *Journal of Democracy* (2003) 3, 60.

⁴ *General Framework Agreement for Peace in Bosnia and Herzegovina*, 14 December 1995, 35 ILM 89 [GFA].

⁵ P. Gaeta, ‘The Dayton Agreements and International Law’, 7 *European Journal of International Law* (1996) 2, 147, 147.

⁶ *Ibid.*, 149.

Republika Srpska, and the Federation of Bosnia and Herzegovina,⁷ which are not themselves Parties to the GFA.

The GFA itself merely serves as a guarantee for the implementation of its Annexes. In most of the eleven articles of the GFA, the Parties 'welcome and endorse' the arrangements of a respective annex.

It has thus been observed that the relation between the GFA and its Annexes resembles a reverse legal logic, because the Annexes in fact provide the detailed provisions of the peace agreement while the GFA itself simply works as a safeguard mechanism.⁸

The United Nations Security Council (UN SC or Security Council) expressed its political support for the *Dayton Peace Agreement* in several resolutions. One day after the Agreement was initialled, on 22 November 1995, the Security Council, acting under Chapter VII, adopted *Resolution 1022*, thus adding considerable weight to the *Agreement on Initialling* and to the GFA. *Resolution 1022* conditionally suspended the economic sanctions which had been imposed on the Federal Republic of Yugoslavia and on the Bosnian Serbs until then. Yet they were to be automatically reimposed if the Federal Republic of Yugoslavia would fail to sign the Peace Agreement.⁹ Thus, the Security Council offered strong incentives for compliance with the agreement.

Similarly, in *Resolution 1031*, the UNSC endorsed the High Representative's (HR) responsibility for civilian implementation, as requested by the Parties to *Annex 10* of the GFA, and designated Carl Bildt as first High Representative.¹⁰ This was not a "prerequisite for validity" of the DPA, but simply added political authority to it.¹¹

Mirroring the two principle goals of Dayton – ending the fighting and creating a viable Bosnian State – the Annexes may be divided into two groups: one covering essentially the military agenda of reaching a robust cease-fire (*Annex 1A*), fostering regional stabilization (*Annex 1B*), and delimitating the Inter-Entity Boundary Lines under IFOR protection (*Annex 2*).

⁷ Annexes 1A, 2, 3, 4, 6, 7, 8 & 11 to the GFA. These Annexes can be found in 35 ILM 91-107, 111-128, 130-143 & 149-152. Annexes 5 & 9 to the GFA (35 ILM 129 & 144-146) are concluded only between those constituent entities. Annexes 1B & 10 to the GFA (35 ILM 108-111 & 149-152) are in turn concluded by all the Parties to the GFA and the constituent entities of the Republic of BiH.

⁸ Gaeta, *supra* note 5, 156.

⁹ SC Res. 1022, UN Doc S/RES/1022, 22 November 1995, 2, para. 1.

¹⁰ SC Res. 1031, UN Doc S/RES/1031, 15 December 1995, 4-5, para. 26.

¹¹ G. Nystuen, *Achieving Peace or Protecting Human Rights?: Conflicts Between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (2005), 48.

The other covering those Annexes which reflect the broader agenda of state-building in BiH, pertaining to issues like the new constitution (*Annex 4*), protection of human rights (*Annex 6*), and more generally to the legitimacy to Bosnia's new power-sharing institutions (*Annex 3, Annex 5*).

The most important annex for present purposes, *Annex 10* (the *Agreement on Civilian Implementation*), defines the mandate of the High Representative. In Article I (2), the Republic of Bosnia and Herzegovina, the Republic of Croatia, the FR Yugoslavia, the Federation of Bosnia and Herzegovina, and the Republika Srpska request as the Parties to *Annex 10*

“the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a U.N. Security Council resolution, the tasks set out below”.¹²

The mandate of the High Representative includes for example the tasks to “[m]onitor the implementation of the peace settlement”,¹³ to “[m]aintain close contact with the Parties”,¹⁴ and to “[c]oordinate the activities of the civilian organizations and agencies”.¹⁵ Yet the controversial dynamics of the HR's mandate stem from Article V in connection with Article II (1) (d). While Article II (1) (d) vests the HR with the power to “facilitate [...] the resolution of any difficulties arising in connection with civilian implementation”,¹⁶ Article V grants the power to issue binding interpretations of *Annex 10*.¹⁷

Annex 10 also highlights the limited Security Council involvement in the creation of the OHR, as it only states that the appointment of the High Representative should be “consistent with relevant United Nations Security Council resolutions”.¹⁸ The limited role played by the UN and by third States in

¹² *Annex 10* to the GFA, Art. I (2), 35 ILM 146, 147 [Annex 10 to the GFA].

¹³ *Ibid.*, Art. II (1) (a), 147.

¹⁴ *Ibid.*, Art. II (1) (b), 147.

¹⁵ *Ibid.*, Art. II (1) (c), 147.

¹⁶ *Ibid.*, Art. II (1) (d), 147.

¹⁷ *Ibid.*, Art. V, 148: “The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement.”

¹⁸ *Ibid.*, Art. I (2), 147.

the contractual arrangements of the DPA can be seen as a clear affirmation of Bosnian independence and sovereignty.

This constitutes a fundamental difference to other, externally imposed international administrative arrangements which granted direct oversight to the UN such as United Nations Interim Administration Mission in Kosovo (UNMIK) and United Nations Interim Administration in East Timor (UNTAET) in East Timor.¹⁹ The Bosnian case of international territorial administration is thus sometimes portrayed as being based on local consent, instead of external imposition. The idea of local consent has also sparked the argument that the Bosnian people have subjected themselves to the authority of the High Representative, who is responsible for interpreting the Social Contract which lies at the heart of their State.²⁰

C. Interpreting the *Annex 10* Mandate Under the *Vienna Convention on the Law of Treaties*

I. OHR Measures Justified on Grounds of *Annex 10* Express Powers

In an interview, Carlos Westendorp, HR in BiH from 1997 to 1999, bluntly explained this flexibility: “[...] if you read Dayton very carefully, *Annex 10* even gives me the possibility to interpret my own authorities and powers”.²¹ This is indeed a correct reading of the HR’s mandate. Yet it is far from obvious how the OHR could have bloated its mandate from being a co-ordinator and manager of the implementation process to imposing substantial legislation, dismissing senior government officials, and overriding decisions of the Constitutional Court simply based on his *Annex 10* mandate. The authority to interpret cannot be understood as a *carte blanche* for the OHR to create its mandate. Under this reading of *Annex 10* the OHR would acquire a status *legibus solutus*. However, international organizations are, as “[a] rule of thumb”,²²

¹⁹ See SC Res. 1244, UN Doc S/RES/1244 (1999), 10 June 1999 and SC Res. 1272, UN Doc S/RES/1272 (1999), 25 October 1999, respectively.

²⁰ W. Bain, *Between Anarchy and Society - Trusteeship and the Obligations of Power* (2003), 150.

²¹ S. Bosna, ‘Carlos Westendorp Reveals his Opinion About the Bosnian Politicians’ (30 November 1997), available at http://www.ohr.int/ohr-dept/press/pressi/default.asp?content_id=3407 (last visited 15 August 2014).

²² H. G. Schermers & N. M. Blokker, *International Institutional Law*, 5th ed. (2011), 157, para. 209.

not allowed to generate their own powers or to determine their competences.²³ Moreover, general international law sets out rules of interpretation by which the HR has to abide when interpreting his mandate. Hence, exemplary decisions of the HR will be analyzed with regards to their compliance with these rules. They will be presented categorized in subsections according to the respective field of OHR activity.

1. Imposition of Substantial Legislation

The first imposition of substantial legislation occurred on 16 December 1997 when the OHR unilaterally signed a *Law on Citizenship of BiH*.²⁴ This decision was deemed “of utmost importance for the Peace Process”²⁵ and was imposed without the consent of the BiH Parliament:

“It is with regret that I have been informed about the failure of both Houses to take a similar decision with regard to the Law on Citizenship on Bosnia and Herzegovina within the said deadline. *In accordance with my authority under Annex 10 of the Peace Agreement* and Article XI of the Bonn Document, I do hereby decide that the Law on Citizenship of Bosnia and Herzegovina shall enter into force by 1 January 1998 on interim basis, until the Parliamentary Assembly adopts this law in due form, without amendments and no conditions attached.”²⁶

The total circumvention, or rather abrogation, of the national legislative process and the order to adopt the decision as national law ‘without amendments and no conditions attached’ meant the complete subjugation of national legislative bodies to the will of the OHR. This was partly justified with the OHR’s ‘authority under *Annex 10* of the Peace Agreement’.

Numerous examples of the HR’s imposition of national legislation based on his Annex 10 powers can be found: On 1 March 1998, the OHR established

²³ See *ibid.* and M. N. Shaw, *International Law*, 6th ed. (2008), 1306-1309.

²⁴ OHR, ‘Decision Imposing the Law on Citizenship of BiH’ (16 December 1997), available at http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=343 (last visited 15 August 2014).

²⁵ *Ibid.*

²⁶ *Ibid.* (emphasis added). As to the Bonn Document, see section E. below.

the *Interim Mostar Airport Authority*²⁷ and made the nomination of its personnel dependent on his consent.²⁸ Shortly after, the OHR imposed a new design of banknotes.²⁹ On 12 November 2000, the OHR enacted its broadest package of legislation, when it imposed several laws introducing EU standardisations in various fields,³⁰ annulled already existing Bosnian laws,³¹ and established the BiH State Court.³²

2. Removal of Public Officials

The OHR further developed the practice of dismissing public officials from their offices and banning them from holding any public employment again. This was done so often without even admitting the dismissed persons to confront the charges brought against them, let alone granting them a fair hearing or a right to appeal.

On 5 March 1999, the OHR removed Nikola Poplasen from the Office of President of Republika Srpska on grounds of allegedly abusing his power,

²⁷ OHR, 'Decision Establishing an Interim Arrangement to Run the Mostar Airport' (1 March 1998), available at http://www.ohr.int/decisions/mo-hncantdec/default.asp?content_id=110 (last visited 15 August 2014).

²⁸ *Ibid.*, Art. 2.

²⁹ OHR, 'Decision Imposing the Design of Bank Notes' (27 March 1998), available at http://www.ohr.int/decisions/econdec/default.asp?content_id=19 (last visited 15 August 2014).

³⁰ See, e.g., OHR, 'Decision Imposing the BiH Law on Standardisation, Introducing EU Standards' (12 November 2000), available at http://www.ohr.int/decisions/econdec/default.asp?content_id=44 (last visited 15 August 2014) [OHR, Decision Imposing the BiH Law on Standardisation]; OHR, 'Decision Imposing the BiH Law on Metrology, Introducing EU Standards' (12 November 2000), available at http://www.ohr.int/decisions/econdec/default.asp?content_id=43 (last visited 15 August 2014); OHR, 'Decision Imposing the BiH Law on Measuring Units, Introducing EU Standards' (12 November 2000), available at http://www.ohr.int/decisions/econdec/default.asp?content_id=42 (last visited 15 August 2014); OHR, 'Decision Establishing the BiH Law on Accreditation, Introducing EU Standards' (12 November 2014), available at http://www.ohr.int/decisions/econdec/default.asp?content_id=40 (last visited 15 August 2014).

³¹ OHR, 'Decision Annuling the Amendments on the RS Law on Pension and Disability Insurance From October 2000' (12 November 2000), available at http://www.ohr.int/dpa/default.asp?content_id=36 (last visited 15 August 2014).

³² OHR, 'Decision Establishing the BiH State Court' (12 November 2000), available at http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=362 (last visited 15 August 2014); OHR, 'Decision Imposing the Law on the State Court of BiH' (12 November 2000), available at http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=5228 (last visited 15 August 2014).

blocking the will of the people of Republika Srpska, refusing to abide by the decisions of the National Assembly, and obstructing the implementation of the GFA.³³ The action taken was partly justified by an invocation of the OHR's *Annex 10* powers supposedly contained in Articles V and II (1) (d).³⁴ Other examples include the removals of Mile Marceta,³⁵ elected mayor of the town Drvar, and of Pero Raguz from his position as elected Mayor of Stolac.³⁶ Under HR Petritsch (1999 to 2002) and HR Ashdown (2002 to 2006), the dismissals were extended to *en masse* removals where, for example, on 30 June 2004, Ashdown dismissed fifty-eight persons from public office on an *ad hoc* basis.³⁷

3. Judicial Reform and Annulment of the Constitutional Court's Decision

Two more striking examples of the OHR's mandate interpretation concern the judiciary of BiH. In 2000, the OHR initiated a judicial reform project by setting up an individual complaints procedure and by establishing the Independent Judicial Commission (IJC) to oversee the new procedure. Yet the individual complaints procedure was highly ineffective. In 2002, the OHR issued a decision, based on Article V and Article II (1) (d) *Annex 10*, which ended the procedure and demanded that all judges and prosecutors would have to resign and reapply for their positions.³⁸ The Council of Europe (CoE) expressed serious doubts about the lawfulness of such a measure. It was particularly concerned about breaches of basic principles of an independent judiciary, such

³³ OHR, 'Decision Removing Mr. Nikola Poplasen From the Office of President of Republika Srpska' (5 March 1999), available at http://www.ohr.int/decisions/removalssdec/default.asp?content_id=267 (last visited 15 August 2014) [OHR, Decision Removing Mr. Nikola Poplasen From the Office of President of Republika Srpska].

³⁴ *Ibid.*

³⁵ OHR & Organization for Security and Co-operation in Europe, 'Drvar Arbitration Award' (16 September 1999), available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=4789 (last visited 15 August 2014).

³⁶ OHR, 'Decision Removing Pero Raguz From his Position as Mayor of Stolac' (4 March 1998), available at http://www.ohr.int/decisions/removalssdec/default.asp?content_id=256 (last visited 15 August 2014).

³⁷ These decisions are available at <http://www.ohr.int/decisions/archive.asp> (last visited 15 August 2014).

³⁸ OHR, 'Decision Suspending all Judicial and Prosecutorial Appointments in BiH [...], Pending the Restructuring of the Judicial System' (4 April 2002), available at http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=7349 (last visited 15 August 2014) [OHR, Decision Suspending all Judicial and Prosecutorial Appointments in BiH].

as the irremovability and life tenure of appointed judges.³⁹ The CoE further noted that the measure might constitute a violation of Article 6 of the *European Convention on Human Rights* (ECHR).⁴⁰

Secondly, on 23 March 2007, HR Schwarz-Schilling annulled a decision of the Bosnian Constitutional Court in which the judges had found the practice of dismissing public officials in contravention of the ECHR. Here the OHR expressly prohibited any attempt to establish a domestic mechanism to review its decisions.⁴¹ The decision made it very clear that the OHR would not allow any Bosnian institution to challenge its claimed authority.

II. The Legality of the OHR's Measures Under General Rules of Interpretation

The OHR claims an extensive authority that does not seem to correspond to its power to interpret. It is questionable how the invoked combination of Article V and Article II (1) (d) *Annex 10* could have justified the measures listed above.

Article V vests the HR with "the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement".⁴² In the cases mentioned, this authority has been applied on Article II (1) (d) which states that the High Representative shall "[f]acilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation".⁴³

Clearly, when interpreting these provisions, the interpreter would be bound by the limitations set out in international law. Article 31 of the 1969 *Vienna Convention on the Law of Treaties* (VCLT) provides a "[g]eneral rule of interpretation".⁴⁴ This rule is applicable in the given case, as *Annex 10* is 'a treaty

³⁹ OHR, 'Discussion Paper on the Selection Process for the Interim High Judicial Council' (22 March 2002), available at http://esiweb.org/pdf/esi_europeanraj_judicialreform_id_2.pdf (last visited 15 August 2014), 3-4, Sec. 4 (a).

⁴⁰ *Ibid.*, 5-7, Sec. 4 (d).

⁴¹ OHR, 'Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al., No. AP-953/05' (23 March 2007), available at http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=39397 (last visited 15 August 2014), Art. 3 [OHR, Order on the Implementation of the Decision of the Constitutional Court in the Appeal of Milorad Bilbija et al.].

⁴² *Annex 10* to the GFA, *supra* note 12, Art. V, 148.

⁴³ *Ibid.*, Art. II (1) (d), 147 (emphasis added).

⁴⁴ *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 31, 1155 UNTS 331, 340 [VCLT].

between States' in the sense of Article 1 VCLT, and secondly because Article 31 VCLT reflects customary international law.⁴⁵ As the OHR is bound by the same rules as the parties to *Annex 10*, it also has to conform to the general rule of interpretation. Article 31 (1) VCLT stipulates that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁴⁶

Paragraph 2 defines the mentioned “context for the purpose of the interpretation”⁴⁷ and paragraph 3 provides additional means of interpretation “to be taken into account, together with the context”.⁴⁸

These provisions combine the different historic methods of interpretation.⁴⁹ Such interpretation will be given in the following.

The final authority to interpret is indeed a power to interpret. The ordinary meaning of ‘authority’ is “[p]ower delegated to a person or body to act in a particular way. The person in whom authority is vested is usually called an [...] agent and the person conferring the authority is the principal.”⁵⁰

A legal power to interpret means that the interpretation is binding upon others and, possibly, the interpreter himself. The decisive criterion here is the legally binding character. Hence, the OHR is allowed to make interpretations on *Annex 10* which are binding and final, meaning they cannot be appealed against in any higher instance. The meaning of ‘interpretation’ must simply be understood as a “judicial process” of “determining the true meaning of a written document” which is “effected in accordance with a number of rules and

⁴⁵ Shaw, *supra* note 23, 933.

⁴⁶ VCLT, Art. 31 (1), *supra* note 44, 340.

⁴⁷ *Ibid.*, Art. 31 (2), 340.

⁴⁸ *Ibid.*, Art. 31 (3), 340.

⁴⁹ Villiger points out that there have been five traditional approaches towards interpretation: 1. the subjective method, which inquires the intentions of the drafting parties and thus may heavily rely on the travaux préparatoires; 2. a textual or grammatical method, which regards the actual treaty text as the most authoritative expression of the drafters' common will; 3. the contextual or systematic method, which seeks the meaning of the treaty terms in their wider context; 4. the teleological or functional method based on the object and purpose of a treaty; and 5. the logical method, which uses abstract principles and supposedly pure rationality in order to interpret a legal text. See M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), 421-422 (para. 1). The methods mentioned seem to be closely interlinked and not to be easily separated. Other authors only identify three major approaches. See, e.g., I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (1984), 115; Shaw, *supra* note 23, 932-933.

⁵⁰ J. Law & E. A. Martin (eds), *A Dictionary of Law*, 7th ed. (2009), 50.

presumptions”.⁵¹ Again, the applicable rules and presumptions for the process of interpretation are contained in Article 31 VCLT.

At first, interpreting Article II (1) (d) *Annex 10* ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ does in fact yield results which are irreconcilable with the measures adopted by the OHR. Already a determination of the ordinary meaning – the starting point in this “single combined operation”⁵² – reveals an excessive misinterpretation of Article II (1) (d). Black’s Law Dictionary defines the meaning of ‘to facilitate’ in the context of criminal law as “[t]o make the commission of a crime easier”.⁵³ The notion of helping someone in doing something is reproduced by general English language dictionaries. Pocket Fowler’s Modern English Usage ascribes the following meaning to ‘facilitate’: “to make easy or feasible.”⁵⁴ In the New Oxford American Dictionary ‘facilitate’ is said to mean “to make (an action or process) easy or easier”.⁵⁵ From this, one can deduce the semantic consensus that ‘to facilitate’ does mean to improve the basic requirements or pre-conditions of a certain action. Yet it excludes the actual performing or implementing of the respective action. This meaning of ‘to facilitate’ must be read into Article II (1) (d) as forming its ordinary meaning.

However, these findings stand in stark contrast to the idea of Article II (1) (d) being the legal basis for a legal power to perform numerous executive tasks which actually do resolve “any difficulties arising in connection with civilian implementation”.⁵⁶ The actual resolution of such difficulties is precisely reserved for other bodies than the OHR, namely for the Parties to *Annex 10*. Otherwise, it would not have been necessary to expressly include the word ‘facilitate’ in the treaty text. The far-reaching interpretation of Article II (1) (d) as adopted by the OHR would have been correct if the treaty text simply said: “The High Representative shall resolve, as the High Representative judges necessary, any difficulties arising in connection with civilian implementation.”

By taking into account the context of Article II (1) (d) in accordance with Article 31 (1) and (2) VCLT, the misinterpretation becomes even more obvious. The proper contextual reading of Article II (1) (d) should start with a view to

⁵¹ *Ibid.*, 294.

⁵² ILC, *Draft Articles on the Law of Treaties with Commentaries*, Art. 27 & 28, Yearbook of the International Law Commission (1966), Vol. II, 187, 217, 219-220 (para. 8) [Draft Articles on the Law of Treaties with Commentaries].

⁵³ B. Garner (ed.), *Black’s Law Dictionary*, 9th ed. (2009), 668.

⁵⁴ R. Allen (ed.), *Pocket Fowler’s Modern English Usage*, 2nd ed. (2008), 249.

⁵⁵ A. Stevenson (ed.), *New Oxford American Dictionary*, 3rd. ed. (2010), 619.

⁵⁶ *Annex 10* to the GFA, Art. 2 (1) (d), *supra* note 12. 147.

the OHR's powers expressed in the remaining letters of Article II (1). Clearly powers, such as the *monitoring* of the peace settlement's implementation, the maintaining of close contact with the Parties, the *coordination* of the activities of civilian organizations and agencies or the powers to *participate* in meetings and to *report* periodically on the implementation process, are very general and emphasize the OHR's *auxiliary* character. They do not support the view that the OHR possesses substantial executive or even legislative powers. Article I (1) *Annex 10* places the OHR in line with a "considerable number of international organizations and agencies [that] will be called upon to *assist*".⁵⁷ Whatever broad interpretation of 'assisting' might have been maintained up to this point, Article I (2) crushes any illusion about the OHR as a powerful institution:

"In view of the complexities facing them, the Parties request the designation of a High Representative [...] to facilitate *the Parties' own efforts* [...]."⁵⁸

Hence, the Parties are meant to be in charge of the actual implementation – the OHR is simply vested with a supportive or a catalyst function in this process. The OHR's practice to impose substantial legislation is particularly opposed to this function and the forced adoption of legislation can by no means be portrayed as a 'facilitation of the Parties' own efforts'.

Considering the Bosnian Constitution in *Annex 4* as an "agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty",⁵⁹ it becomes clear that the imposition of substantial legislation was simply a usurpation of powers actually belonging to the Parliamentary Assembly:

"The Parliamentary Assembly shall have responsibility for [e]nacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution."⁶⁰

At this point it even seems doubtful that Article II (1) (d) actually constitutes a legal power. Considering the ordinary meaning in its context

⁵⁷ *Ibid.*, Art. 1 (1), 147 (emphasis added).

⁵⁸ *Ibid.*, Art. 1 (2), 147 (emphasis added).

⁵⁹ VCLT, Art. 31 (2) (a), *supra* note 44, 340.

⁶⁰ *Annex 4* to the GFA, Art. IV (4) (a), 35 ILM 117, 122.

as stated above, it seems that the auxiliary function granted to the OHR by Article II (1) (d) is lacking the decisive criterion of a legally binding character. It is thus also possible to think of Article II (1) (d) as a mere competence, meaning precisely not a legal power with legally binding effects.

This reveals that the OHR has also blatantly disregarded the limits of its power under Article V *Annex 10*. The “final authority in theater regarding interpretation” only relates to “this Agreement on the civilian implementation of the peace settlement”,⁶¹ namely *Annex 10*. However, the OHR was engaged in an interpretation of Annex 4. The contextual interpretation of Article II (1) (d) *Annex 10* shall be concluded with a remark on Article 1 GFA, which also forms part of its context as a related agreement in the sense of Article 31 (2) (b) VCLT:

“In particular, the Parties shall fully respect the sovereign equality of one another [...] and shall refrain from any action, by threat or use of force or otherwise, against the territorial integrity or *political independence* of Bosnia and Herzegovina or any other State.”⁶²

This reference to Bosnian political independence figures prominently in the DPA and it is by no means intelligible as to why the OHR should be so radically exempted from the underlying obligation to respect it. Any measures adopted by the OHR which undermine the political independence of Bosnia must thus be seen as based on an interpretation contrary to the treaty's context in the sense of Article 31 (2) (b) VCLT.

The decisions of the OHR can also not be seen as “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.⁶³ This is precisely so because they never established agreement among the parties.

Finally, attention should be paid to the treaty's object and purpose while interpreting Article II (1) (d) *Annex 10*. In the case of *Annex 10*, Article 1 clearly identifies its object and purpose as “the implementation of the civilian aspects of the peace settlement”.⁶⁴ Those are understood to entail

“a wide range of activities including continuation of the humanitarian aid effort for as long as necessary; rehabilitation of infrastructure and economic reconstruction; the establishment of political and

⁶¹ *Annex 10* to the GFA, Art. V, *supra* note 12, 148.

⁶² GFA, Art. 1, *supra* note 6, 89 (emphasis added).

⁶³ VCLT, Art. 31 (3) (b), *supra* note 44, 340.

⁶⁴ *Annex 10* to the GFA, Art. 1 (1), *supra* note 12, 147.

constitutional institutions in Bosnia and Herzegovina; promotion of respect for human rights and the return of displaced persons and refugees; and the holding of free and fair elections according to the timetable”.⁶⁵

The crux is that most of the OHR’s measures described above might roughly be placed in one of those categories. Supposing the measures were necessarily required to give full effect to the civilian implementation of the peace settlement, which is as a question of public policy far from being proven, the OHR would still have to comply in its teleological interpretation with the standards of an *effective interpretation*. These limitations have been set up to exclude “an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty”, meaning that “to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but *to revise* a treaty”.⁶⁶ It has been demonstrated by means of a textual and a contextual interpretation that the adopted measures can hardly be termed a necessary implication of the treaty terms. This is why the OHR has unlawfully exerted its power to interpret *Annex 10*. Thus, all measures arising directly from this misinterpretation must be seen as not being in accordance with the OHR’s *Annex 10* mandate. The role of the OHR as inscribed in the DPA can by no means be understood as exceeding the function of a ‘mediator’ or a ‘facilitator’. No executive or legislative prerogatives can be read into *Annex 10* without revising it.

This is also true for the practice of dismissals. For instance, with regards to Mr. Poplasen’s dismissal, it is obvious that the measure does not find a proper legal basis in Articles V and II (1) (d). The interpretation adopted stands again in stark contrast to the ordinary meaning of ‘to facilitate’ in context of the whole treaty. Moreover, in most cases of dismissal the OHR has also acted in violation of Article 31 (3) (c) VCLT which demands that as further authentic means of interpretation “[a]ny relevant rules of international law applicable in the relations between the parties” be taken into account.⁶⁷ As mentioned above, those relevant rules of international law have been understood to include, amongst others, all multilateral treaties applicable in the relations between the parties. Again, it must be assumed that the parties to a treaty did not intend to

⁶⁵ *Ibid.*

⁶⁶ *Draft Articles on the Law of Treaties with Commentaries*, Art. 27 & 28, *supra* note 48, 217, 219 (para. 6) (emphasis added).

⁶⁷ VCLT, Art. 31 (3) (c), *supra* note 43, 340.

breach their previous obligations by entering into a new treaty.⁶⁸ Furthermore, it cannot be assumed that the parties did intend to breach their obligations under an “instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties”,⁶⁹ such as the other annexes to the GFA. Yet the interpretation adopted by the OHR in the given cases would amount to precisely this. It violates fundamental rights and freedoms as enshrined in *Annex 6* to the GFA, for example “[t]he right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings”.⁷⁰ Besides, the adopted interpretation is also not in conformity with Article I (2) of the *Bosnian Constitution* which establishes the rule of law as an important democratic principle.⁷¹ Ironically, the OHR accused Poplasen of “acting against democratic principles” and of “disregarding the General Framework Peace Agreement and the Constitution of Bosnia and Herzegovina Agreement”.⁷²

The late *en masse* dismissals must be seen as the crudest infringements of the principles of rule of law and the right to due process. Bearing in mind the above interpretation of Article II (1) (d) *Annex 10*, it is impossible to justify such actions based on the OHR's *Annex 10* mandate.

The analysis shows that the OHR has continuously misinterpreted its *Annex 10* powers. Decisions taken under the adopted interpretation can by no means be said to be in compliance with *Annex 10*, Articles II (1) and V. First and foremost, the OHR has totally failed in determining the ordinary meaning of Article II (1) (d) *Annex 10* which it constantly claimed to be the legal basis for the measures adopted. By doing so, it neglected the “first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty”.⁷³ Any interpretation adopted in such outright disregard of the ordinary meaning can only be seen as a wilful circumvention of the intent of the parties. Neither can an interpretation based on outright disrespect for the will of the parties be said to conform with the principle of good faith. The OHR's massive excess of power violates any ‘legitimate expectations raised in other parties’ and must be seen as evading its obligations under *Annex 4* and *Annex 6*. The amendment and

⁶⁸ Villiger, *supra* note 45, 133.

⁶⁹ VCLT, Art. 31 (2) (b), *supra* note 43, 340.

⁷⁰ *Annex 6* to the GFA, Art. I (5), 35 ILM 130, 130.

⁷¹ *Annex 4* to the GFA, Art. I (2), *supra* note 54, 118.

⁷² OHR, ‘Decision Removing Mr. Nikola Poplasen From the Office of President of Republika Srpska’, *supra* note 33.

⁷³ *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 3 March 1950, ICJ Reports 1950, 4, 8.

violation of constitutional provisions, the imposition of substantial legislation, the removal of democratically elected officials, and the annulment of decisions of the Bosnian Constitutional Court are measures which dramatically exceed the outer limits of an effective interpretation. In fact, the interpretation adopted by the OHR must be termed a revision of *Annex 10* of the GFA.

D. Interpreting the Annex 10 Mandate Under the Implied Powers Doctrine

I. The Legitimacy of International Transitional Administration

Yet, one might intuitively ask, should the powers granted to the OHR not be extended further than that, considering the intricate and demanding task of running an international transitional administration effectively? This issue of legitimacy reaches into the heart of the OHR mandate debate because it addresses the decisive question of who should have the final authority over the process of transition; local actors or the international community? It stems from a continuous tension between the idea of local ownership and the exercise of broad powers by the international administrative body which has frequently been pointed out to underlie the concept of state-building.⁷⁴ The idea of local ownership is closely related to the broader process of democratization of the administered entity and derives particular value from ensuring the sustainability of the transitional project. Only if the local population is allowed to participate in the creation of governmental structures and in the transfer of powers to them, it is likely that the project will be successful in the long run.⁷⁵ On the other side, a premature return to local ownership can have massively destabilizing effects. Chesterman explains the origin of the legitimate exercise of powers by international bodies; if the local community would have possessed the necessary military and economic capacities to ensure peace and economic development, a transitional administration would not have been required in the first place. Thus, he further argues, a transitional administration should also be empowered to undertake military, economic, and political measures which the local

⁷⁴ B. Knoll, *The Legal Status of Territories Subject to Administration by International Organizations* (2008), 289 et seq. & 318.

⁷⁵ S. Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (2004), 143.

community cannot yet exercise itself. This is why the 'final authority' should be placed with the international administrative mission.⁷⁶

Yet Chesterman's argument tacitly recognizes the necessary temporal limitation of such missions. If international transitional administration is supposed to substitute for the lack of governance capacities on part of the local actors, it must naturally be assumed that the transitional administration is terminated as soon as those capacities are regained. This is not the case for the OHR. The OHR's mandate does not contain specific provisions on its termination.⁷⁷ That alleviated the practice of prolonging the OHR's presence in BiH several times. The mandate was first extended for two more years in 1996 after the first free and fair general elections in BiH which were expected by some to trigger the termination of the OHR mission.⁷⁸ This was followed by an indefinite extension in December 1997. In July 2006, HR Schwarz-Schilling, who seemed at that point of time to advocate a strategy of 'domestic political ownership', announced the closure of his office for June 2007.⁷⁹ Schwarz-Schilling was subsequently dismissed in February 2007 and replaced by Miroslav Lajčák who pursued a re-assertion of the 'Bonn Powers' and was backed by another extension of the OHR mandate.⁸⁰ An earlier attempt to counter this immense legitimacy deficit was made by HR Ashdown in January 2003 by issuing the *Mission Implementation Plan* (MIP).⁸¹ The MIP tried to "identify the core tasks on which the OHR now needs to concentrate in order to accomplish its mission".⁸² However, the proposed MIP was handicapped insofar as it granted the OHR unrestrained leeway in setting the exact goals for the termination of its mandate and in interpreting when such goals have been reached. This phenomenon of moving 'goal posts' has been described by Knaus:

⁷⁶ *Ibid.*

⁷⁷ R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008), 234.

⁷⁸ Parish, *supra* note 1, 17.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, 17-18.

⁸¹ OHR, 'Mission Implementation Plan' (30 January 2003), available at http://www.ohr.int/ohr-info/ohr-mip/default.asp?content_id=29145 (last visited 15 August 2014).

⁸² *Ibid.* Such tasks were defined as 1. entrenching the rule of law; 2. ensuring that extreme nationalists, war criminals, and organized criminal networks cannot reverse peace implementation; 3. reforming the economy; 4. strengthening the capacity of BiH's governing institutions, especially at the State-level; 5. establishing State-level civilian command and control over armed forces, reform the security sector, and pave the way for integration into the Euro- Atlantic framework; 6. promoting the sustainable return of refugees and displaced persons. *Ibid.*

“First, there are the moving goalposts. In the early days of the protectorate, its stewards described their challenge as the establishment of law and order and basic public institutions. As those aims were met, the nationalist parties emerged as culprits in the failure of Bosnian democracy. Once they lost power, general crime and corruption [...] became the difficulties in Bosnia. Like Proteus in the Greek myth, every time it appears to have been defeated, the problem with Bosnia changes shape. The second dynamic has been the way in which the OHR’s powers have expanded to meet each newly defined challenge.”⁸³

Knaus further argues that, if the exercise of broad powers could initially have been legitimate on grounds of a ‘state of emergency’, this justification has today vanished. BiH’s membership in the CoE has been referred to as an indicator for the country’s state of development which supposedly stands in a dramatic contradiction to the notion of a ‘state of emergency’.⁸⁴ Hence, any further exercise of such powers would necessarily erode the OHR’s legitimacy.

The developments in BiH can be described as a struggle for final authority between local actors and the OHR.⁸⁵ It is doubtful to what extent the OHR actually represents the supposedly unified interests of the international community and to what extent this dynamic represents the OHR’s strive for self-preservation. From a political science perspective, the autonomous development of international institutions, in the sense of being divorced from the will of their founders, has been analyzed as an inherent characteristic of bureaucracies. It is understood as a problem of agency which surfaces if the principal grants powers to its agent:

⁸³ Knaus & Martin, *supra* note 3, 69. See also R. Caplan, ‘Who Guards the Guardians? International Accountability in Bosnia’, 12 *International Peacekeeping* (2005) 3, 463, 472.

⁸⁴ Knaus & Martin, *supra* note 3, 72.

⁸⁵ This particular understanding of the events is also shared by the European Stability Initiative: “In fact, what is really at stake in Bosnia today is neither its peace nor its territorial integrity: it is the authority of the international mission, the OHR and its political master, the Peace Implementation Council (PIC), which comprises 55 countries and international organisations involved in the peace effort.” European Stability Initiative, ‘The Worst in Class: How the International Protectorate Hurts the European Future of Bosnia and Herzegovina’ (8 November 2007), available at http://esiweb.org/pdf/esi_document_id_98.pdf (last visited 15 August 2014), 4.

“The fact that delegation is a *conditional* grant of authority does not imply that the international bureaucracy necessarily does what principals want or had expected. The term ‘agency slack’ captures actions by the agent that are undesired by the principal. Agents do ‘implement policy decisions and pursue their own interests strategically.’”⁸⁶

Already, Machiavelli seems to have noticed the difficulties of instituting extraordinary powers in such a way that they do not expand indefinitely. Drawing on the example of dictators in ancient Roman republics, he observes that no such mission should be expected to place limitations upon itself; instead, the exercise of emergency powers should rather depend on clear limitations to avoid open-endedness and expansion.⁸⁷

Naturally, this antagonism of interests has produced two clashing narratives about who should legitimately hold the final authority in BiH. While local actors frame the struggle as a “conflict over the degree of local participation (devolution)”, international actors perceive it as a conflict “over the quality of local participation (standards)”.⁸⁸ The OHR can certainly be described as a policy institution set up for the purpose of enhancing the quality of governance in post-war BiH. As Wilde puts it, the OHR has been established for “filling a perceived ‘vacuum’ in local territorial governance”.⁸⁹ This ‘governance policy’ necessarily demanded the OHR’s activity in broad domains such as securing the post-Dayton territorial status and in the field of a “broad agenda concerning effectiveness, democracy, the rule of law, and liberal economic policy”.⁹⁰

It cannot be neglected that some of the OHR’s early coercive decisions were indeed legitimate under the mentioned governance policy, even if they were not in accordance with the OHR’s *Annex 10* mandate.⁹¹ Chesterman

⁸⁶ I. Venzke, ‘International Bureaucracies From a Political Science Perspective – Agency, Authority and International Institutional Law’, 9 *German Law Journal* (2008) 11, 1401, 1409 (footnotes omitted).

⁸⁷ Knaus & Martin, *supra* note 3, 70 *et seq.*

⁸⁸ Knoll, *supra* note 65, 319 (emphasis omitted).

⁸⁹ Wilde, *supra* note 68, 207.

⁹⁰ *Ibid.*, 207-234.

⁹¹ Wilde mentions in this respect the decision of 7 March 2001 in which the OHR “purported to dismiss Ante Jelavić as the elected Croat representative of the State Presidency, banning him from holding public and party offices in the future, because of Jelavić’s declaration of independence on the part of ‘Herzeg-Bosna’ covering the Bosnian Croat areas of the Federation. So OHR exercised governance in an effort to prevent the Federation from unraveling.” (Wilde, *supra* note 68, 215 (footnote omitted)). The legitimacy of the OHR’s

makes an argument for the legitimacy of early OHR decisions when he observes that nationalist parties had regained their political support around 1996 while the implementation of the DPA faltered.⁹² This had inspired the international administration to pursue what he calls “a reversal of moves towards self-governance”.⁹³ During the ongoing conflict both parties produce arguments which are intended to challenge the legitimacy of the other. Local actors aim their arguments basically at the OHR’s accountability deficit which results from the OHR’s practice of setting benchmarks for evaluating the governance performance of local actors while remaining itself totally unaccountable for any of its own acts of governance.⁹⁴ The CoE did in fact admonish the OHR for not providing any legal remedy against its decisions in a 2004 Parliamentary Assembly resolution.⁹⁵ The ‘international agent’ in return adopts arguments for the purpose of delegitimizing the ‘local agent’ in the eyes of the public:

“[P]ortraying it as overly corrupt, as failing to transcend nationalist attitudes and values, of being incapable of conforming to the benchmarks set for local self-government, or as incompetent to introduce a review mechanism, as in the case of the OHR, the international authority communicates that the institutional resources for democratic authorization are lacking.”⁹⁶

It seems virtually impossible to strike the right balance in this struggle – the situation is termed for good reason a ‘paradox of state-building’ – and it is not the intent of this study to further immerse into the issue of legitimacy.

decision must then be seen in the attempt to prevent a separation of BiH. The ‘state-of-emergency-argument’ would arguably be applicable here.

⁹² Chesterman, *supra* note 66, 131.

⁹³ *Ibid.*

⁹⁴ Knoll, *supra* note 65, 319.

⁹⁵ “The scope of the OHR is such that, to all intents and purposes, it constitutes the supreme institution vested with power in Bosnia and Herzegovina. In this connection, the Assembly considers it irreconcilable with democratic principles that the High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal recourse.” Parliamentary Assembly of the Council of Europe, ‘Resolution 1384’ (23 June 2004), available at <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17232&Language=EN> (last visited 15 August 2014), para. 13. See also European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, Doc. CDL-AD (2005) 004, 11 March 2005, 2, para. 1.

⁹⁶ *Ibid.*

Yet it is important to notice that both claims for legitimacy have validity to a certain extent and that the OHR's excess of its *Annex 10* powers might have been justified in certain instances because of the goals and purpose of international transitional administration. It thus seems required to reassess the *legality* of the OHR's conduct on the basis of a broader standard which takes such teleological considerations into account more seriously.

Indeed, considerations on legitimacy may find sufficient legal grounds in certain developments in the law of international institutions. The founding documents of international organizations have long been considered to warrant an interpretation which is strongly driven by teleological considerations and thus does not primarily rely on a textual approach. Many scholars understand the founding documents of international organizations to bear an 'organic-constitutive element' that distinguishes them from other multilateral international treaties. This is so because the constituent treaties of international organizations are often concluded for an indefinite period of time and are intended to serve a "common goal".⁹⁷

The deviation from general rules of interpretation is strongest and most established when it comes to the powers of an international organization. The doctrine of implied powers assumes in this respect that an "organization [...] [has] certain powers which are additional to those expressly stipulated in the constituent instrument".⁹⁸ Again, the doctrine is closely linked to the constitutional character of constituent treaties and originally stems from constitutional law, especially from U.S. constitutional law.⁹⁹ The basis of implied powers is the idea that an international organization needs to be able to cope with the necessities of international life, therefore they are sometimes portrayed as "dynamic and living creatures".¹⁰⁰ As such necessities are constantly changing

⁹⁷ J. Klabbers, *An Introduction to International Institutional Law*, 2nd ed. (2009), 74-75.

⁹⁸ K. Skubiszewski, 'Implied Powers of International Organizations', in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989), 855, 856.

⁹⁹ *Ibid.*, 855-856.

¹⁰⁰ Klabbers, *supra* note 87, 58. This idea of an inherent flexibility in the constituent treaties of international organizations is opposed to the notion of 'attributed powers' or 'the principle of speciality'. The doctrine of attribute powers and the 'principle of speciality' both originate from *Jurisdiction of the European Commission of the Danube Between Galatz and Braila*, Advisory Opinion, PCIJ Series B, No. 14 (1927). Here the Court avoided to address any doctrinal issues, but stated that "[a]s the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definite Statute with a view to the fulfilment of that purpose". *Ibid.*, 64. Emanating from positivist thought, the doctrine of attributed powers allows powers only

and developing to an extent which cannot be completely envisaged at the time an international organization is founded, reliance on the static concept of express powers would be inadequate to respond to them. In order to avoid such power-necessities gaps and to act dynamically, an international organization should possess more than its express powers, it should possess subsidiary powers by means of implication.¹⁰¹

II. The OHR as an International Organization

In order to be subject to the implied powers doctrine, the OHR would also have to qualify as an international organization. This legal status forms a necessary precondition for the application of the doctrine and could serve as a justification for a broad interpretation of the *Annex 10* powers by means of implication.

At first, there is no specific law of international organizations. In order to answer legal questions about international organizations, one has to reason by analogy and view each international organization on its own merits. However, there are certain common characteristics or indicators which allow an assessment of whether a certain institution is also an international organization. Those indicators may be found in the *1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (VCLT-IO) which, although not yet entered into force, may give guidance in this matter.¹⁰² Similarly, the *Draft Articles on Responsibility of International Organizations* of the International Law Commission may serve as a guiding instrument.¹⁰³

According to Article 2 (1) (a) (i) VCLT-IO, international organizations are established between States and thus intergovernmental in character. Article 2 (1) (a) VCLT-IO provides that international organizations are established by treaty governed by international law. Thus, contracts and acts governed by national law

to exist if they had been expressly conferred upon an international organization by its Member States. See for this Klabbers, *supra* note 87, 56.

¹⁰¹ Skubiszewski, *supra* note 88, 855 *et seq.*; Schermers & Blokker, *supra* note 22, 180-189, paras 232-236; Klabbers, *supra* note 87, 59-64; N. D. White, *The Law of International Organisations*, 2nd ed. (2005), 83-87.

¹⁰² *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, 21 March 1986, UN Doc A/CONF.129/15, 25 ILM 543 [VCLT-IO].

¹⁰³ ILC, *Draft Articles on Responsibility of International Organizations*, 3 June 2011, UN Doc A/66/10, 54, para. 87.

are excluded. The treaty is either concluded by States or by other international organizations. Furthermore, international organizations must possess at least one organ with a "distinct will".¹⁰⁴ The characteristic of 'distinct will' reaches into the heart of the concept of international organizations, namely the problematic relationship between the organization and its Member States. As formulated by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, international organizations are "new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals".¹⁰⁵ Hence, 'distinct will' may mean the ability to adopt norms which are broadly conceived by and addressed to the members.

It is unproblematic to apply the first two criteria on the OHR. *Annex 10* is a treaty, amongst others, concluded between States and hence governed by international law. Also, the 'distinct will' criterion is fulfilled in the case of BiH because the OHR adopts norms addressed to it and conceived by it. Yet an abnormality can be observed when it comes to the Republic of Croatia and the Republic of Serbia which are not at all addressed by any act of the OHR and hardly fall into the scheme of Member States in the sense of the VCLT-IO.

Equally, the fact that the OHR enjoys the privileges and immunities of a diplomatic mission under Article III (4) *Annex 10* does not point to the legal status of an international organization. This is so because diplomatic immunity and the immunity of international organizations are two separate concepts resting on different legal bases.

The concept of diplomatic immunity only explains the personal immunity of the diplomatic agent, but not the immunity of an international organization as a legal person. More fundamentally, the doctrine of diplomatic immunity rests on the idea of reciprocity. That means that the consent of the receiving State is required. That is not the case for the appointment of international organizations personnel. Also no *persona non grata* declaration is possible for the headquarter State of an international organization.

The proper basis for immunities of international organizations can be explained by the theory of functional necessity. For example, Article 105 of the *Charter of the United Nations* (UN Charter) states that the UN as a legal person and its officials shall enjoy immunity in the territory of its Member States "as it is

¹⁰⁴ Klabbers, *supra* note 87, 49.

¹⁰⁵ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, 66, 74-75, para. 19.

necessary for the fulfilment of its purposes”.¹⁰⁶ However, the notion of necessity also implies a distinction between official and private acts. As only official acts are necessary for the fulfilment of the organization’s purpose, consequently only these acts are also covered by immunity according to Article V section 18 (a) of the *Convention on the Privileges and Immunities of the United Nations*.¹⁰⁷

In sum, the immunities of international organizations and their officials are limited to a greater extent than is the case under diplomatic law. This means in return that the OHR’s express grant of diplomatic immunities under Article III (4) *Annex 10* must be understood as a negative indicator for the legal status of an international organization. It must be pointed out here that the concept of diplomatic immunity, as stipulated by *Annex 10*, is not exactly fitting for the OHR. As mentioned, the core idea of diplomatic immunity is its reliance on reciprocity when States mutually consent to enter into diplomatic relations. This kind of reciprocity cannot be applied to the OHR.

An inquiry into the legal status of the OHR is hampered by the ambiguous position the OHR takes itself in this respect. As the government of the Republika Srpska notes in its *Fourth Report to the United Nations Security Council* of December 2010: “The High Representative, however, has been inconsistent and entirely opportunistic in describing his legal status before courts and tribunals.”¹⁰⁸

Here reference is made to the case of *Anthony Sarkis v. Miroslav Lajčák* where HR Miroslav Lajčák is understood to be “[when] acting in his [...] official capacity [...] as an employee of a foreign state”.¹⁰⁹ Contrary to this notion of a mere ‘instrumentality of foreign States’,¹¹⁰ the OHR argued in the case of *Dušan Berić and Others Against Bosnia and Herzegovina* before the European Court

¹⁰⁶ *Charter of the United Nations*, 26 June 1945, Art. 105, 1 UNTS XVI.

¹⁰⁷ *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, Art. V (section 18 (a)), 1 UNTS 15, 24.

¹⁰⁸ Government of the Republika Srpska, ‘Government of Republika Srpska Post-Election Priorities: Economic Growth; Restoration of Constitutional and Democratic Government; European Integration: Fourth Report of Republika Srpska to the UN Security Council’ (December 2010), available at http://rep-srpska.eu/documents/fourth_report_to_security_council.pdf (last visited 15 August 2014), 32, para. 103.

¹⁰⁹ *Anthony Sarkis v. Miroslav Lajčák*, *Office of the High Representative*, Specially Appearing Defendants Notice of Motion and Motion to Dismiss, U.S. District Court for the Northern District of California, Case No. C 08 01911 RMW, 31 October 2008, available at http://findforms.com/download_pdf.php?file=http://www.findforms.com/pdf_files/cand/202278/21.pdf (last visited 15 August 2014), 14.

¹¹⁰ *Ibid.*

of Human Rights (ECtHR)¹¹¹ that it was independent from any State and in essence an international body:

“The High Representative argued that his office had been created by, and he derived his powers from, various international instruments, including legally binding UNSC resolutions, and that his actions could not engage the responsibility of any State.”¹¹²

The ECtHR followed this reasoning and declared the case inadmissible because the applicants' complaint was “incompatible *ratione personae* within the meaning of Article 35 § 3 of the Convention”, as no State which is a party to the Convention was found to be in effective control over the OHR.¹¹³

In these two cases, the OHR has indeed taken inconsistent positions with regards to its legal status. While the latter case would suggest the legal status of an international organization and would thus allow for an application of the implied powers doctrine, the former case does not.

A more nuanced version of the OHR's legal status, which takes into account the complexity of the legal setting, is promulgated by the BiH Constitutional Court. When the Court was asked to review the constitutionality of the *Law on State Border Service* as enacted by the OHR, it based its reasoning on the standard of 'functional duality'.¹¹⁴ In its respective decision of 3 November 2000, the Court pointed out similarities to the situation in post-World War II Germany and explained the OHR's position within two different legal systems. Those are, on the one side, international law as the source of the OHR's mandate, and, on the other side, domestic Bosnian law when the OHR functions as a substitute for domestic authorities:

“[...] [T]he High Representative [...] intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the

¹¹¹ *Dušan Berić and Others v. Bosnia and Herzegovina*, ECtHR Application Nos 36357/04 et al., Decision as to the Admissibility of 16 October 2007.

¹¹² *Ibid.*, 14, para. 25.

¹¹³ *Ibid.*, 17, para. 30.

¹¹⁴ *Request for Evaluation of Constitutionality of the Law on State Border Service*, Constitutional Court of Bosnia Herzegovina, Case No. U-9/00, Decision of 3 November 2000, available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=22419 (last visited 15 August 2014), 2, para. 5.

nature of a national law and must be regarded as a law of Bosnia and Herzegovina.¹¹⁵

Undoubtedly, this was a ground-breaking decision as it manifested the option of incidental norm control as long as the respective HR decision affects the BiH Constitution. The Court clearly distinguished between the OHR's interpretative authority deriving from its *Annex 10* powers on the one side and normative powers in the sphere of national legislation on the other side.¹¹⁶ More interestingly, HR Schwarz Schilling confirmed the theory of functional duality in his decision on the annulment of a Constitutional Court decision:

“Recalling that the High Representative has, based on his powers deriving from Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, agreed to waive the immunity he enjoys under the said Annex and consented to the review of certain of his acts within the framework of the above mentioned domestic theory of functional duality.”¹¹⁷

However, if the OHR acts partly as a substitute for local authorities, this is hard to reconcile with the concept of an international organization. The clear-cut rules of the VCLT-IO for example demonstrate that international organizations in general do not occupy such an in-between position within two legal orders.¹¹⁸ Bodies of international territorial administration, such as the OHR, must consequently be regarded as a hybrid concept rooted in the international legal sphere as well as in the domestic legal sphere which does not fit easily into the general concept of international organizations. Knoll observes with reference to the UN that once the international administrative body has established its authority over a given territory, the domestic legal order of this territory becomes part of the international administration's own legal order.¹¹⁹

¹¹⁵ *Ibid.*

¹¹⁶ C. Stahn, 'International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead', 60 *Heidelberg Journal of International Law* (2001) 1, 107, 169.

¹¹⁷ OHR, 'Order on the Implementation of the Decision of the Constitutional Court in the Appeal of Milorad Bilbija et al.', *supra* note 41, Preamble (part 16).

¹¹⁸ VCLT-IO, Preamble, *supra* note 92, 543-545.

¹¹⁹ Knoll, *supra* note 65, 180.

Therefore the OHR could be called a “*sui generis* international organization”¹²⁰ to which some of the above mentioned indicators apply, while others do not. A more precise solution would be to label the OHR a treaty organ. As Klabbers points out, some international institutions fall short of being an international organization and have simply been established to implement a treaty.¹²¹ He further argues that the distinction between international organizations and treaty organs is “diminishing at any rate” and is already being abrogated by the use of the broader term of international institutions.¹²² Yet it still seems to be the most suited analytical category to place the OHR into, as it best corresponds to the OHR’s lack of some of the above outlined characteristics of an international organization. Besides, to qualify the OHR as a treaty organ takes into account its strong link to the DPA, whose civil implementation is the sole purpose of the OHR.

III. Applicability of the Implied Powers Doctrine in Case of the OHR

After all, this calls, for a very careful application of the implied powers doctrine based on the restrictive standard of implication, which relies on the actual express powers as a legal basis. This narrow standard of implication was famously adopted by Judge Hackworth in his Dissenting Opinion on the ICJ Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*:

“Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are ‘necessary’ to the exercise of powers expressly granted.”¹²³

Hence, the respective decisions adopted by the OHR would have to ‘flow from a grant of expressed powers’ and would have to be ‘necessary to the exercise’ of such express powers.

Assessing the existence of an implied power by this standard, necessarily reverts attention to the express powers of Articles V and II (1) (d) *Annex 10*.

¹²⁰ Wilde, *supra* note 68, 67 (emphasis added).

¹²¹ Klabbers, *supra* note 87, 8.

¹²² *Ibid.*, 9.

¹²³ Dissenting Opinion by Judge Hackworth, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports 1949, 174, 196, 198.

It cannot be argued that Articles V and II (1) (d) *Annex 10* could serve as the basis for any implied power which would exceed the purely 'auxiliary' function of the OHR as it has been inscribed into those articles. In fact, it must be noted at this point that the existence of express powers can be seen under certain circumstances as a bar to the exercise of an implied power if the power to be implied would "substantially encroach on, detract from, or nullify other powers".¹²⁴ As Campbell argues, this limitation can be inferred primarily from the ICJ Advisory Opinion on *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*. Here the Court only reached its decision that the UN General Assembly (GA) had the power to establish an Administrative Tribunal as its subsidiary organ according to Article 22 *UN Charter* after it had emphasized that this power would not interfere or detract from other express powers contained in the *UN Charter*.¹²⁵ Campbell concludes from this that the ICJ did not allow the implication of a power "which was inconsistent with, and which would not merely complement, an express power the exercise of which was mandatory".¹²⁶

Applying this argument to the OHR's power to 'facilitate the resolution of any difficulties arising in connection with civilian implementation', it becomes clear that to imply a power to make binding decisions in context with the resolution of such difficulties would mean to 'substantially encroach' upon the given express power. This is so because it would nullify the auxiliary character enshrined in this provision and it would encroach upon the 'parties own effort' to resolve potential disputes. Hence, it would harshly distort the division of powers between the parties to the agreement and the OHR as envisaged in *Annex 10*.

For the exercise of the OHR's power 'to facilitate the resolution of difficulties', it is also by no means necessary to adopt binding decisions on the dismissal of public officials or on the annulment of decisions of the Constitutional Court. Any attempt to place the mentioned OHR decisions within the limits of necessity would again be based on a fundamental misconception of the meaning and context of the Articles V and II (1) (d) *Annex 10*.

¹²⁴ A. I. L. Campbell, 'The Limits of the Powers of International Organisations', 32 *International and Comparative Law Quarterly* (1983) 2, 523, 528.

¹²⁵ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1954, 47, 59-60 [Effect of Awards Case]. Campbell, *supra* note 124, 528.

¹²⁶ Campbell, *supra* note 528 (emphasis omitted).

In fact, the OHR's role as a facilitator only necessitates much weaker powers. What could be thought of as an implied power necessary for the exercise of Article II (1) (d) *Annex 10* is, for instance, a prerogative to suggest certain solutions to the parties which they would then be required to consider in their own effort to actually resolve potential difficulties. Obviously it is hard to think of measures which would be necessary in this respect and which would at the same time exceed the status of a mere competence by having any legally binding effect. Next to (1) (d), Article II speaks of monitoring, coordinating, and reporting. This wording is after all difficult to reconcile with the notion of legal powers, as a legally binding effect may only in very limited circumstances be deduced from it. Article II (1) suggests a much more subtle influence on Parties' own efforts. It seems impossible to conclude that for its exercise an implied power to make binding decisions would be necessary.

E. The 'Bonn Powers' as a Lawful Post-Dayton Grant of Powers?

As noted above, the role of the OHR, as inscribed into the DPA, can by no means be understood as exceeding the function of a 'mediator' or 'facilitator'. No executive or legislative prerogatives can be read into Annex 10 without revising it. Yet no formal revision of the *Annex 10* mandate in form of an amendment procedure according to Article 40 VCLT has ever been initiated. Instead, the OHR suggests an alternative legal basis for its alleged power to make binding decisions.

Besides Article V *Annex 10* in connection with Article II (1) (d) *Annex 10*, the OHR has frequently justified its decisions on grounds of section XI (2) of the *Conclusions of the Peace Implementation Conference* held in Bonn (Bonn Conclusions).¹²⁷ Thus, numerous decisions of the OHR use the following formulation which has been interpreted to vest the OHR with the so-called 'Bonn Powers':

"Recalling paragraph XI.2 of the Conclusions of the Peace Implementation Conference held in Bonn on 9 and 10 December 1997, in which the Peace Implementation Council welcomed the High Representative's intention to use his final authority in

¹²⁷ PIC, 'Bosnia and Herzegovina 1998: Self-sustaining Structures' (10 December 1997), available at http://www.ohr.int/pic/default.asp?content_id=5182#11 (last visited 15 August 2014), Sec. XI (para. 2) [PIC Bonn Conclusions].

theatre, regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement, in order to facilitate the resolution of any difficulties as aforesaid ‘by making *binding decisions*, as he judges necessary.’¹²⁸

Reference to section XI of the *Bonn Conclusions* suggests that the Peace Implementation Council (PIC) has endowed the OHR with a power to make binding decisions. Whether this is the case will be examined in the following sections.

I. The Peace Implementation Council

The PIC was called into existence at the Peace Implementation Conference, held at Lancaster House in London from 8 to 9 December 1995, which was organized to “mobilise international support” for the DPA.¹²⁹ The PIC consists of 55 member countries, and agencies that supposedly “support the peace process in many different ways [...]”.¹³⁰

The 1995 *London Conclusions* identify the PIC as the successor of the International Conference on the Former Yugoslavia (ICFY) and as “a new structure [...] to manage peace implementation”.¹³¹ A Steering Board was established “to work under the chairmanship of the High Representative as the executive arm of the PIC”.¹³² More importantly, the Steering Board was intended to give “political guidance on peace implementation” to the OHR.¹³³

This first document issued by the PIC also provides an early orientation about how the PIC understands the OHR’s mandate. The PIC *London Conclusions* include a special section on the High Representative which pronounces a markedly *Annex 10*-oriented understanding of the OHR:

“In view of the complexity of the tasks, the parties have requested the designation of a High Representative who, in accordance

¹²⁸ OHR, ‘Decision Imposing the BiH Law on Standardisation’, *supra* note 30, Preamble (part 2) (emphasis added).

¹²⁹ OHR, ‘The Peace Implementation Council and its Steering Board’ (16 February 2012), available http://ohr.int/pic/default.asp?content_id=38563 (last visited 15 August 2014).

¹³⁰ *Ibid.*

¹³¹ PIC, *Conclusions of the London Meeting*, 12 December 1995, 35 ILM 223, 228, para. 20 [PIC London Conclusions].

¹³² OHR, ‘The Peace Implementation Council and its Steering Board’, *supra* note 118.

¹³³ *PIC London Conclusions*, *supra* note 132, 229, para. 21 (c).

with the civilian implementation annex of the Peace Agreement, will monitor the implementation of the Peace Agreement and mobilize and, as appropriate, coordinate the activities of the civilian organisations and agencies involved.”¹³⁴

This understanding was upheld in the following conference reports, such as in the 1996 PIC *Florence Conclusions*. Here the PIC noted that a “spirit of willing cooperation on the part of the parties” especially in the field of civilian implementation was still lacking.¹³⁵ It therefore appreciated “the energetic way in which the High Representative and his team have executed the task of *overall monitoring and coordination*”.¹³⁶ Next to this, the importance and coherence of the DPA was affirmed and it was stressed that the monopoly over enforcement measures would clearly lie with the UN SC through the option of re-imposing the sanctions of SC *Resolution 1022*.¹³⁷ The role of the OHR was again clearly confined to its monitoring and reporting powers.

In reviewing the first year of peace implementation, the PIC *Paris Conclusions* of 14 November 1996 contained guiding principles on the future consolidation of the civilian implementation. At that point in time it was already envisaged responsibility would be transferred to local authorities.¹³⁸ It was confirmed that “the prime responsibility for implementing the Peace Agreement lies with the different authorities of Bosnia and Herzegovina”.¹³⁹ Most striking is however the role attributed to the Presidency of Bosnia and Herzegovina:

“It accordingly undertakes as a high priority to establish all the joint institutions provided for in the Constitution and make them fully operational as soon as possible, *as well as to resolve such disputes* as may arise within this framework.”¹⁴⁰

¹³⁴ *Ibid.*, 228, para. 17.

¹³⁵ Peace Implementation Council, ‘*Chairman’s Conclusions of the Peace Implementation Council*’ (13 June 1996), available at http://ohr.int/pic/default.asp?content_id=5169 (last visited 15 August), para. 5 [PIC Florence Conclusions].

¹³⁶ *Ibid.*, para. 2 (emphasis added).

¹³⁷ *Ibid.*, para. 6.

¹³⁸ Ministerial Meeting of the Steering Board and of the Presidency of Bosnia-Herzegovina, *Conclusions: Guiding Principles of the Civilian Consolidation Plan (14 November 1996)*, available at http://www.ohr.int/pic/default.asp?content_id=5173 (last visited 15 August 2014), para. 2 [PIC Paris Conclusions].

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, para. 3 (emphasis added).

This view is completely in line with the above suggested interpretation of Article II (1) (d) which excludes the actual resolution of such disputes and places it under the authority of the parties to *Annex 10*.

Correspondingly, the powers of the OHR are again limited to making recommendations to the Bosnian authorities. In contrast to the OHR's own assertions, here, even its power to interpret is only perceived as a power to recommend a particular version of interpretation.¹⁴¹

Very similarly to the preceding conclusions, the conclusions of the 1996 PIC Main Meeting in London emphasize the reporting and recommendation powers of the OHR.¹⁴² Furthermore, this document is of interest as it reaffirms the role of the Steering Board in giving 'political guidance' to the OHR and because it expresses the PIC's self-understanding of being "the overall structure supervising peace implementation in Bosnia and Herzegovina".¹⁴³

While all of the mentioned Conclusions so far reflect a very modest understanding of the OHR's powers, the following *Political Declaration* of the Steering Boards Ministerial Meeting in Sintra marks a turning-point in this respect. In several instances it still highlights the auxiliary role of the OHR.¹⁴⁴ Yet in paragraph 70, the Steering Board simply declares that the OHR possesses powers which are not at all in line with its *Annex 10* mandate:

"The Steering Board is concerned that the media has not done enough to promote freedom of expression and reconciliation. It declared that the High Representative has the right to curtail or suspend any media network or programme whose output is in persistent and blatant contravention of either the spirit or letter of the Peace Agreement."¹⁴⁵

It is already at first sight questionable how a body like the Steering Board with the repeatedly stated purpose of giving *political* guidance could simply

¹⁴¹ *Ibid.*, para. 6.

¹⁴² Peace Implementation Conference, 'Bosnia & Herzegovina 1997: Making Peace Work' (5 December 1996), available at http://www.ohr.int/pic/default.asp?content_id=5175 (last visited 15 August 2014), Sec. Co-Ordination Structures (para. 6).

¹⁴³ *Ibid.* (para. 4).

¹⁴⁴ OHR, *Political Declaration From Ministerial Meeting of the Steering Board of the Peace Implementation Council*, UN Doc S/1997/434 annex, 5 June 1997, 2, 7, 9-10, paras 46, 57, 61 & 68 [PIC Sintra Declaration].

¹⁴⁵ *Ibid.*, 11, para. 70.

vest the OHR with powers that it did not possess on grounds of its *Annex 10* mandate by means of an expressly *political* declaration.

Nevertheless, this new authority was readily embraced by the OHR. In August 1997, the OHR ordered that the complete board of a Serb radio and television station, known for spreading ethnic propaganda, had to resign. This action was not backed by any other formal legal instrument and must be seen as a direct result of the preceding *Political Declaration*. It finally paved the way for what was to become known as the 'Bonn Powers'. In a final step of this expansive dynamic, the PIC issued its so-called *Bonn Conclusions* after a PIC Main Meeting in Bonn in December 1997. Paragraph 2 of this document has, as demonstrated above, become a cornerstone in the OHR's argumentation, as it

“welcomes the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to *facilitate the resolution of difficulties by making binding decisions*, as he judges necessary”.¹⁴⁶

Particularly, paragraph 2 (c) of the *Bonn Conclusions* provided a *carte blanche* in this respect. Its broad wording allows any binding decision to be subsumed under 'other measures to ensure implementation' and does not place any restriction on the conduct of the OHR. The far-reaching

'Bonn Powers' seem to neglect totally the will of the parties to the DPA and their frequent invocation has been the reason why the OHR gained the reputation of being an “international protectorate”.¹⁴⁷ The following section will thus examine the legal plausibility of this power-granting model.

II. The 'Bonn Powers' as Delegated Powers?

Indeed, it is questionable whether the 'Bonn Powers' could have been lawfully conferred upon the OHR as delegated powers additional to the ones enshrined in the OHR's *Annex 10* mandate.

The practice of delegating powers from one organ to another organ of an international institution is generally accepted subject to the precondition that the two organs stand in a principal-subordinate relationship to each other.¹⁴⁸ Within the UN system, this is for example the case if a principal organ establishes a

¹⁴⁶ *PIC Bonn Conclusions*, *supra* note 129, Sec. XI (para. 2) (emphasis added).

¹⁴⁷ Knaus & Martin, *supra* note 3, 69; Parish, *supra* note 1, 11.

¹⁴⁸ Schermers & Bokker, *supra* note 22, 172-173, para. 224.

subsidiary organ according to Article 7 (2) *UN Charter*. In order to qualify as a subsidiary organ, the respective body has to be established by a principal organ¹⁴⁹ which needs to maintain authority and control over it.¹⁵⁰

More generally, the principal organ may delegate powers to its subsidiary organ even if the constituent document does not entail a specific provision on delegation.¹⁵¹

Secondly, two basic restrictions apply to all acts of delegation accumulatively: The powers delegated may not exceed the extent of powers which the delegating organ itself possesses¹⁵² and responsibility may not be conferred to the subsidiary organ.¹⁵³

The OHR suggests that it received a grant of power from the PIC, but does not employ a specific legal language when it refers to the PIC as a source of its assumed power to make binding decisions. It does not expressly state whether such a power was conferred upon it by means of delegation, but simply *recalls*¹⁵⁴ or *endorses*¹⁵⁵ Section XI (2) of the *Bonn Conclusions* as the legal basis for a particular exercise of its alleged 'Bonn Powers'. In order to qualify as a lawful act of delegation, this conferral must have been in compliance with the two basic restrictions and the OHR must be a subsidiary organ of the PIC.

At first, the powers granted by the PIC to the OHR must have been fully in the possession of the PIC. The power concerned is the power to make binding decisions as stated in section XI (2) of the *Bonn Conclusions*. Yet a look at the 1995 London Conclusions, the founding document of the PIC, reveals that no express powers have been bestowed upon the PIC. It is only suggested that the PIC would play a role in managing the process of peace implementation.¹⁵⁶ The only relevant express power contained in the document is the power of the Steering Board to give political guidance to the OHR.¹⁵⁷ Yet this power cannot possibly be the basis for a delegated power to make binding decisions. The political character of any recommendation issued by the Steering Board

¹⁴⁹ D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005), 119.

¹⁵⁰ *Ibid.*, 128.

¹⁵¹ Schermers & Bokker, *supra* note 22, 172-173, para. 224.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ OHR, 'Decision Imposing the BiH Law on Standardisation', *supra* note 30.

¹⁵⁵ OHR, 'Decision Suspending all Judicial and Prosecutorial Appointments in BiH', *supra* note 38.

¹⁵⁶ PIC London Conclusions, *supra* note 120, 228, para. 20.

¹⁵⁷ *Ibid.*, 228-229, para. 21 (c).

under this power would by definition be juxtaposed to the notion of a legally binding character. This fact already precludes the option of a lawful delegation of the 'Bonn Powers'.

Furthermore, in order to delegate powers to the OHR, a clear principal-subordinate relationship between the PIC and the OHR, as two organs of the same institution, must be given. If this institutional nexus cannot be established, the 'Bonn Powers' can also not originate from a delegation of powers.

The usual method of creating organs is to amend the constituent treaty accordingly. Yet alternatives exist. Subsidiary organs can also be "created subsequently by a decision of one of the organs mentioned in the constitution".¹⁵⁸ This was held by the ICJ in its 1954 Advisory Opinion on *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*. Here the Court justified the creation of the UN Administrative Tribunal based on the notion that in creating a subsidiary organ, the GA was only exercising a power which it already possessed under the *UN Charter*.¹⁵⁹ The actual legal basis for this was never mentioned by the Court. Yet it has been understood to lie in either Article 7 or Article 22 *UN Charter*.¹⁶⁰ It is thus not necessary that a subsidiary organ stems from the same constituent document as its principal or primary organ.

Still, to depict the OHR as a subsidiary organ of the PIC would mean to distort reality. At first and as a matter of logic, it cannot be assumed that the existence of a subsidiary organ was envisaged in detail prior to any effort made for the establishment of its principal organ. However, this would be precisely the case here. The OHR's establishment was already negotiated at the time the *Agreement of Initialling* was concluded (21 November 1995). The *London Conclusions* expressly refer to this fact¹⁶¹ and thus must be seen as mere reaction to it. Moreover, the OHR's independence and completeness is evidenced by the fact that no reference is made to the PIC in *Annex 10*. The PIC, on the contrary, relies heavily on reference to the OHR. Taken together with the stated purpose of the PIC, this only allows the conclusion that the PIC is a body created to support the OHR. If it was to determine the exact hierarchy between the two bodies, the fact that the PIC's Steering Board is chaired by the High Representative would indicate that the PIC is the subsidiary organ in this relation, not the other way around. However, the fact that the PIC has no single mentioning in the GFA,

¹⁵⁸ Schermers & Bokker, *supra* note 22, 155, para. 205.

¹⁵⁹ *Effect of Awards Case*, *supra* note 127, 61.

¹⁶⁰ Klabbers, *supra* note 87, 165.

¹⁶¹ *PIC London Conclusions*, *supra* note 120, 225, para. 1.

the central document of the peace agreement, is more important. If it would have been intended to vest the PIC with any meaningful legal role, it would have made its way into the agreement. Hence the required institutional link of a principal-subordinate relation between the PIC and the OHR does not exist. The PIC is simply a parallel structure to the OHR with no authority over it. It works as a joint diplomatic body which may give advice, but may not grant any powers to the OHR.

Moreover, considering the fact that the OHR itself chairs the Steering Board and normally drafts its reports,¹⁶² it would mean to ridicule any notion of institutional balance if one would assume that this body could declare new powers of the OHR as done in the *Sintra Conclusions*.¹⁶³ It would further come close to granting the OHR a '*Kompetenz-Kompetenz*', the power to create its own powers, which is a concept that stands in outright contradiction to the idea of international institutions.

With regards to the *Bonn Conclusion*, it is after all not even clear whether the PIC intended to grant the power to make binding decisions to the OHR as it only 'welcomes the *High Representative's intention* to use his final authority in theatre regarding interpretation' in such a way. The language does not at all indicate the PIC's intent to actively grant additional powers to the OHR. If it would have been intended to suggest the legally binding character of this provision, a wording such as 'the Council decides' could have easily been chosen instead of this passive formulation. It is thus much more likely that the PIC was aware of its lack of legal competence and only intended to issue political advice. Everything else must be seen as a tragic form of wishful thinking of the OHR.

In conclusion, a lawful delegation of the so-called 'Bonn Powers' did not occur. Firstly, the PIC cannot delegate such powers to the OHR because the OHR is not a subsidiary organ of the PIC. Secondly, the PIC can also not delegate powers which it does itself not possess. And finally, a delegation of powers was never intended.

III. The 'Bonn Powers' as a Power Granted Through the UN Security Council?

When assessing the option of a post-Dayton grant of additional powers to the OHR, particularly a power to impose legislation, the UN SC has to be considered as the last possible source for such powers. Indeed, it has been

¹⁶² Knaus & Martin, *supra* note 3, 61.

¹⁶³ PIC Sintra Declaration, *supra* note 132, 11, para. 70.

argued by the OHR in very rare cases that its so-called 'Bonn Powers' have been affirmed by the Council:

“Noting that, under Chapter VII of the United Nations Charter, the United Nations Security Council expressly affirmed the aforementioned Conclusions of the Peace Implementation Council in a series of resolutions [...]”¹⁶⁴

Similarly to the preceding section, it must be asked whether the UN SC could have attributed any additional power to make binding decisions to the OHR and whether it did so in its respective resolutions.

At first, it is already questionable whether the UN SC itself has the power to legislate. Yet, even if the UN SC does not itself possess a power to legislate, it would still be possible to transfer such a power to the OHR by means of an attribution of powers as this does not require the attributing organ to possess the attributed power itself. In this case the limits for an attribution of powers to subsidiary organs would apply, as stipulated by the ICTY's Appeals Chamber in the *Prosecutor v. Duško Tadić* case. Here the UN SC was judged capable of establishing subsidiary organs vested with powers, which the Council itself does not possess, as long as the subsidiary organ thus created would be “an instrument for the exercise of its own principal function of maintenance of peace and security”.¹⁶⁵

The question whether the UN SC actually itself possesses a power to legislate has been intensely debated with regards to *SC Resolution 1373*. The resolution addresses any act of terrorism and has been perceived to qualify as an act of legislation because it can be applied as a general rule in an indeterminate number of future cases. Some authors have come to the conclusion that in *Resolution 1373*, the UN SC acted *ultra vires* while, at the same, time acknowledging the fact that no UN organ is allowed to review the legality of

¹⁶⁴ OHR, 'Order Temporarily Suspending Certain Decisions of the Central Election Commission of Bosnia and Herzegovina Adopted at its 21st Session Held on 24 March 2011 and any Proceedings Concerning Said Decisions', (23 March 2011), available at http://ohr.int/decisions/statemattersdec/default.asp?content_id=45890 (last visited 15 August 2014), Preamble (part 3).

¹⁶⁵ *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 38 [Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction].

UN SC resolutions.¹⁶⁶ Precisely from this impossibility of reviewing the legality of UN SC resolutions, others draw the conclusion that the UN SC has the *de facto* power to legislate.¹⁶⁷

Similarly, a look at the *UN Charter* suggests that the UN system envisaged the attribution of legislative powers to subsidiary bodies, such as peacekeeping operations, which exercise powers over territories under transitional government. Article 81 *UN Charter* already foresees the UN administration of territories based on a trusteeship agreement.¹⁶⁸ Also, the effective exercise of Article 42 measures might lead to an UN occupation of territory which in return would have to be administered. More directly, since the measures listed in Article 41 *UN Charter* have been judged to be non-exhaustive in character,¹⁶⁹ it is also possible to think of the creation of civilian institutions with a power to legislate as such a measure under Article 41.¹⁷⁰ Hence, UN administration of territories and the respective exercise of public authority can result from *UN Charter* provisions.

No clear-cut answer to the question as to whether or not the UN SC possesses a power to legislate seems possible. However, for two reasons, the question can be disregarded in the following: Firstly, not all decisions adopted by the OHR do qualify as legislative acts. Some of them, such as dismissals of officials, are merely executive decisions. Secondly, for either kind of power conferral, be it a delegation or an attribution, the receiving organ would have to be established as a subsidiary organ of the UN SC according to Article 29 *UN Charter*.

This precondition would only not apply if the given situation was a case of delegation of UN SC Chapter VII powers to a regional arrangement under Article 53 (1) *UN Charter*. Those Chapter VIII delegations are made to international organizations which are clearly not a subsidiary organ of the

¹⁶⁶ See M. Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations', 16 *Leiden Journal of International Law* (2003) 3, 593, 608.

¹⁶⁷ S. Talmon, 'The Security Council as World Legislature', 99 *American Journal of International Law* (2005) 1, 175.

¹⁶⁸ C. Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis', 5 *Max Planck Yearbook of United Nations Law* (2001), 105, 107-108 [Stahn, *The United Nations Transitional Administrations in Kosovo and East Timor*].

¹⁶⁹ *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *supra* note 153, para. 35.

¹⁷⁰ Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor', *supra* note 156, 139.

UN SC, such as NATO. However, Article 53 (1) only concerns the delegation of military enforcement powers¹⁷¹ and is thus not applicable to the OHR.

In order to clarify whether or not the OHR was established as a subsidiary organ to the UN SC and whether the Council actually vested the OHR with such additional powers, it is conducive to compare the situation to prior cases of transitional administration with UN SC involvement, namely the UNMIK and the UNTAET. UNMIK was established in 1999 by SC *Resolution 1244* under Chapter VII powers of the UN SC.¹⁷² It was clearly placed under UN auspices,¹⁷³ and it was vested with the responsibility of “[p]erforming basic civilian administrative functions where and as long as required”,¹⁷⁴ and to support a “democratic and autonomous self-government”.¹⁷⁵ Drawing on the UNMIK precedent, the UN SC deployed a transitional administration mission to East Timor in the same year. Through SC *Resolution 1272*, UNTAET was vested with the overall responsibility to exercise all administrative and legislative powers, as well as with executive powers, including the administration of justice, right from the beginning.¹⁷⁶ Although not expressly stated by the UN SC, the legal basis in both cases has been identified as a conjunction of Article 39 and Article 29 *UN Charter*.¹⁷⁷

This is different with regards to the OHR. In SC *Resolution 1031* of 15 December 1995, the UN SC “[e]ndorses the establishment of a High Representative” within the limits set by *Annex 10* to the GFA.¹⁷⁸ This provision can by no means be equated to the ones deciding on the establishment of UNMIK and UNTAET in SC *Resolution 1244* and SC *Resolution 1272*. In *Resolution 1031*, the UN SC only expresses its support for the establishment of the OHR. It did not itself create the OHR as a subsidiary organ and it does not claim authority or control over it. This self-effacement is indeed conclusive if seen in context with the pre-Dayton negotiation process in which the UN did not play a decisive role. As the OHR was neither established as a subsidiary organ of the UN SC nor established under the auspices of the UN as for example

¹⁷¹ D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (2000), 248.

¹⁷² SC Res. 1244, *supra* note 19.

¹⁷³ *Ibid.*, 2 (operative part 5).

¹⁷⁴ *Ibid.*, 3 (operative part 11 (b)).

¹⁷⁵ *Ibid.*, 3-4 (operative part 11 (c)).

¹⁷⁶ SC Res. 1272, *supra* note 19, 2 (operative part 1).

¹⁷⁷ Stahn, ‘The United Nations Transitional Administrations in Kosovo and East Timor’, *supra* note 156, 139.

¹⁷⁸ SC Res. 1031, *supra* note 10, 4 (operative part 26).

the United Nations Mission in Bosnia and Herzegovina,¹⁷⁹ the UN SC could consequently neither have delegated nor attributed powers to the OHR.

Considering the fact that the legality of UN SC resolutions is not subject to any judicial review, it still remains crucial to determine whether the UN SC did *de facto* transfer such powers to the OHR. In several UN SC resolutions relating to the OHR reference to the so-called 'Bonn Powers' can be found in identical wording:

*“Emphasizes its full support for the continued role of the High Representative in monitoring the implementation of the Peace Agreement and giving guidance to and coordinating the activities of the civilian organizations and agencies involved in assisting the parties to implement the Peace Agreement, and reaffirms that the High Representative is the final authority in theatre regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement and that in case of dispute he may give his interpretation and make recommendations, and make binding decisions as he judges necessary on issues as elaborated by the Peace Implementation Council in Bonn on 9 and 10 December 1997.”*¹⁸⁰

First it must be noted that here the role of the OHR is reduced to 'monitoring the implementation of the Peace Agreement' and to 'giving guidance to and coordinating the activities of the civilian organizations and agencies'. In the same resolutions the UN SC further “[r]eiterates that the primary responsibility for the further successful implementation of the Peace

¹⁷⁹ SC Res. 1035, UN Doc S/RES/1035 (1995), 21 December 1995.

¹⁸⁰ SC Res. 1247, UN Doc S/RES/1247 (1999), 18 June 1999, 2-3 (operative part 4); SC Res. 1423, UN Doc S/RES/1423 (2002), 12 July 2002, 3 (operative part 4); SC Res. 491, UN Doc S/RES/491 (2003), 11 July 2003, 2 (operative part 4); SC Res. 1551, UN Doc S/RES/1551 (2004), 9 July 2004, 2-3 (operative part 4); SC Res. 1575, UN Doc S/RES/1575 (2004), 22 November 2004, 3 (operative part 4); SC Res. 1639, UN Doc S/RES/1639 (2005), 21 November 2005, 3 (operative part 4); SC Res. 1722, UN Doc S/RES/1722 (2006), 21 November 2006, 3 (operative part 4); SC Res. 1785, UN Doc S/RES/1785 (2007), 21 November 2007, 3 (operative part 4); SC Res. 1845, UN Doc S/RES/1845 (2008), 20 November 2008, 3 (operative part 4); SC Res. 1895, UN Doc S/RES/1895 (2009), 18 November 2009, 3 (operative part 4) (emphasis partly added); and SC Res. 1948, UN Doc S/RES/1948, (2010), 18 November 2010, 3 (operative part 4) (emphasis partly added).

Agreement lies with the authorities in Bosnia and Herzegovina themselves".¹⁸¹ This reveals an understanding of the OHR which is very much in line with its original *Annex 10* mandate.

However, the UN SC also makes reference to the PIC *Bonn Conclusions* when it reaffirms that the OHR may make binding decisions. Still, the UNSC does not *decide* that the OHR has the power to make binding decisions, it only *reaffirms* what the PIC concluded. This must be understood as a mere expression of political support. Therefore it does not amount to an actual act of *de facto* granting of powers to the OHR.

To infer a *de facto* grant of powers from a mere expression of UN SC support for an act which was in itself not a grant of power, but only the political advice of a diplomatic body, would truly be legal fiction. It would further imply that the UN SC intended to act outside of its powers because the OHR does not even form a subsidiary organ of the UN SC to which a power could be lawfully granted. In conclusion, it cannot be argued that the so-called 'Bonn Powers' were conferred upon the OHR by the UN SC. However, the fact that the UN SC actually reaffirms the 'Bonn Powers' leaves the situation somewhat ambiguous. While the UN SC clearly did not intend to confer the power to make binding decisions upon the OHR, it must be noted that the Council expressed political support for it.

F. Conclusion

In light of all the above, none of the justifications brought forward by the OHR provides sufficient legal grounds for the extensive use of a self-proclaimed power to make binding decisions today.

As the analysis of the OHR's *Annex 10* mandate demonstrates, the DPA can by no means be regarded as the legal basis for such a power. None of the discussed decisions can be based on *Annex 10* as interpreted in line with Article 31 VCLT. Any attempt of the OHR to root its alleged powers in this central source of authority would thus be based on a systematic misinterpretation of its express mandate in *Annex 10*.

¹⁸¹ SC Res. 1247, *supra* note 179, 2 (operative part 2); SC Res. 1423, *supra* note 179, 2-3 (operative part 2); SC Res. 1491, *supra* note 179, 2 (operative part 2); SC Res. 1551, *supra* note 179, 2 (operative part 2); SC Res. 1575, *supra* note 179, 2-3 (operative part 2); SC Res. 1639, *supra* note 179, 3 (operative part 2); SC Res. 1722, *supra* note 179, 3 (operative part 2); SC Res. 1785, *supra* note 179, 3 (operative part 2); SC Res. 1845, *supra* note 179, 3 (operative part 2); SC Res. 1895, *supra* note 179, 3 (operative part 2); and SC Res. 1948, *supra* note 179, 3 (operative part 2).

Neither could an interpretation that circumvents the will of the parties be said to conform to the principle of good faith as it violates any 'legitimate expectations raised in the parties'. The OHR would furthermore be in evasion of its obligations under Annex 4 and Annex 6. The amendment and violation of constitutional provisions, the imposition of substantial legislation, the removal of democratically elected officials, as well as the annulment of decisions of the Bosnian Constitutional Court are measures which even dramatically exceed the outer limits of an effective interpretation. In fact, the interpretation adopted by the OHR must be termed a revision of *Annex 10* of the GFA.

Also, a reassessment of the OHR's *Annex 10* powers under the implied powers doctrine could not confirm the legality of such sweeping powers today. While it has to be acknowledged that the goals and purpose of any transitional territorial administration require the implementation of a broad agenda in areas related to effectiveness of public service, democracy, the rule of law, and liberal economic policy, it must not be forgotten that such a 'governance policy' is strictly bound to certain temporal limitations. Such limitations are crossed if the administering body simply neglects the fact that local authorities have regained their own governance capabilities. At this point of time, any legitimate and lawful substitution of governance capabilities turns into an illegitimate and unlawful imposition even under the broadest teleological considerations. The OHR has been judged to have crossed those limits. Today its actions seem to thwart its functions and purpose.

Furthermore, it was found that the suggested delegation of the 'Bonn Powers' through the PIC did actually not occur for a number of reasons: Firstly, the PIC could not delegate such powers to the OHR because the OHR is not a subsidiary organ of the PIC. Secondly, the PIC could not delegate powers which it does not possess itself. And finally, a delegation of powers was never intended.

Last but not least, it was not possible to deduce the creation of such additional powers from UN SC involvement. At first, the institutional preconditions of an attribution or delegation of powers through the UN SC do not exist. And secondly, even a *de facto* grant of the 'Bonn Powers' could not be inferred from the relevant SC Resolutions. The UN SC support for the OHR's practice to adopt binding decisions was found to be only of a political nature.

Therefore the OHR cannot rely on the so-called 'Bonn Powers' as a basis for the acts discussed. As a matter of fact, they actually do not qualify as a legal power. Their existence is a powerful, but delusive legal fiction.